IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,740

BANKERS INSURANCE COMPANY,

Petitioner,

-vs-

CARIDAD MACIAS,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

The parties will be referred to as follows: Petitioner, Bankers Insurance Company, as the "insurer" and Respondent, Caridad Macias, as the "insured".

STATEMENT OF THE CASE AND FACTS

The insured accepts the Statement of the Case and Facts in the insurer's Brief on Jurisdiction and adds the following additional statement.

The trial court presumed prejudice to the insurer because of the insured's failure to give adequate notice of the automobile accident. The decision of the district court does not state that there was any proffer, demonstration, or fact-finding at the trial level regarding actual prejudice to the insurer. (A. 1).

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEALS REVERSING THE FINAL JUDGMENT AND REMANDING THE CAUSE TO THE TRIAL COURT FOR DETERMINATION OF THE ISSUE OF WHETHER THE INSURER WAS SUBSTANTIALLY PREJUDICED BY LACK OF NOTICE, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISION OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

The insurer suggests that the decision under review expressly and directly conflicts with two decisions of this Court, one decision of the First District and two decisions of the Fourth District.[1]

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[1] Tiedtke v. Fidelity and Casualty Company of New York, 222 So.2d 206 (Fla. 1969); National Gypsum Co. v. Travelers Indemnity Co., 417 So.2d 254 (Fla. 1982); Klein v. Allstate Insurance Company, 367 So.2d 1085 (Fla. 1st DCA 1979); Bass v. Aetna Casualty and Surety Company, 199 So.2d 790 (Fla. 4th DCA 1967); Travelers Insurance Co. v. Jones, 422 So.2d 1000 (Fla. 4th DCA 1982), rev. denied, 431 So.2d 990 (Fla. 1983).

The pertinent rule of law of the five suggested conflicting decisions remains unchallenged and there exists no "confusion and instability among the precedents." Kyle v. Kyle, 139 So.2d 885 (Fla. 1962); see Neilson v. City of Sarasota, 117 So.2d 731 (Fla. 1960). The rule of law is: prior to an insurer being relieved of liability merely by showing that notice was not given within the provisions of the policy, there must be a demonstration that the insurer has been substantially prejudiced. The questioned decision is not patently erroneous, does not overrule the proffered prior cases on this legal issue and, instead, is harmonious with its predecessors.

The common denominator of all five suggested conflicting cases is the notice provision of an insurance policy and the impact of inadequate notice on the liability of the insurer.

The seminal case, Tiedtke v. Fidelity and Casualty Company of New York, supra at 208, rejected the concept that breach by delayed notice, in itself, is sufficient to negate the insurer's obligations without regard to whether or not the insurer has been prejudiced. The insurer suggests in its Brief that the attacked decision conflicts because it is "eliminating the presumption of prejudice".

On the contrary, the district court opinion in this cause places the concept of prejudice back into this civil action by requiring its consideration and resolution by the trial court upon remand. In Tiedtke, supra at 209, this Court was able to state that the record "clearly demonstrates to us that the issue was raised, and, furthermore, was

explored in depth by counsel for both parties". The decision of the district court herein shows the contrary: the trial court presumed prejudice due to a failure to give adequate notice with no reference to any exploration and finding of actual and substantial prejudice.[2]

Both of the suggested conflicting decisions of the Fourth District (Bass v. Aetna Casualty and Surety Company, supra; Travelers Insurance Company v. Jones, supra) are reconcilable and non-conflicting. In both instances the district court decided that actual prejudice to the insured was a fact for resolution: in Bass, supra at 793, the cause was reversed and remanded for a demonstration of the materiality of the failure to give notice; in Travelers v. Jones, supra; at 1004, 1005, the court found that there was evidence on the question of prejudice and that since the jury was instructed on this as a factual issue, its verdict would not be disturbed on appeal.

The final case suggested for direct conflict, National Gypsum Co. v. Travelers Indemnity Co., supra at 256, contrariwise, supports the district court decision at bar. National Gypsum involved would-be beneficiaries of bonds securing the performance or payment of building and construction contracts. The National Gypsum decision buttressed the requirement that

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2 Likewise, the proffered conflicting decision of Klein v. Allstate Insurance Company, supra at 1086, demonstrates a complete resolution of the prejudice issue by its submission to the jury in a separate trial. That First District decision (citing Tiedtke) essentially stated the appellate court would not reweigh the evidence involving prejudice as found by the jury.

actual prejudice is a question for determination at trial. Moreover, it approved that district court's special concurrence as "the proper rule," which rule concerns a part (burden) of the decision at bar.

That special concurrence (per Schwartz, J.) states that, with the narrow exception of bonds in the construction industry[3], the following doctrine remains intact:

> . . . as to insurance policies in general, the carrier must show that a failure to give required notice has been prejudicial.

Travelers Indemnity Company v. National Gypsum Company, 394 So.2d 481, 485 (Fla. 3d DCA 1981). In the questioned decision, the district court opines (in language not central to reversing the trial court and in conformance with National Gypsum) that, upon remand, the insurer may make this showing. (A. 2).

The district court decision is harmonious with the five suggested conflicting cases in that it returns this cause to the trial court so that the issue of prejudice to the insurer may be resolved -- one way or the other.

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[3] ". . . the construction industry is well aware of the necessity of giving timely notice ..." National Gypsum at 256.

CONCLUSION

Based on the cases and authorities cited herein, the respondent respectfully requests this honorable Court to decline to accept discretionary jurisdiction in this cause because there exists no express and direct conflict between the questioned decision and other decisions of this Court or other district courts of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of Weinstein & Bavly, P.A., 311 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, and to Richard M. Gale, Esq., Suite 2608, New World Tower, 100 N. Biscayne Boulevard, Miami, Florida 33132, this 17th day of September, 1984.

HENRY H. HARNAGE